

# TITLE IX 101

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WHAT YOU NEED TO KNOW

BEATRIZ MATE-KODJO

TIMMER & JUDKINS, PLLC

## WHY ME?

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- I ♥ Title IX

# I'M BIASED

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- Ahlers & Cooney
- Armstrong Teasdale
- Attorney General's Office (various)
- Dickinson
- Husch Blackwell
- Nyemaster Goode
- Swisher & Cohrt
- University General Counsel (various)

# LEGISLATIVE HISTORY

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- Boys rule, girls drool
  - Education + Athletics
    - Football
  - Gender-based violence
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- Jocelyn Samuels and Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 Marq. Sports L. Rev. 11 (2003)  
Available at: <https://scholarship.law.marquette.edu/sportslaw/vol14/iss1/21>

## TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

20 U.S.C. §§ 1681, ET SEQ.

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- No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

## TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

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## TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

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- **“Recipient of Federal Funds”:**
  - schools, local and state educational agencies
  - recipients include approximately 17,600 local school districts, over 5,000 postsecondary institutions, and charter schools, for-profit schools, libraries, and museums.
  - also included are vocational rehabilitation agencies and education agencies of 50 states, the District of Columbia, and territories of the United States.

## TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

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- **“Education programs and activities”:**
  - athletics;
  - sex-based harassment, which encompasses sexual assault and other forms of sexual violence;
  - employment
  - treatment of pregnant and parenting students; discipline; single-sex education;
  - Recruitment, admissions, counseling, financial assistance;



## TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

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- **Retaliation** is a violation of Title IX
  - no recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in a proceeding under Title IX

# ADMINISTERING AGENCY

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- Before: US Dept of Health, Edu, & Welfare (HEW)
  - 1953-1979
- Now: US Dept of Education
  - 1979-Present

# THE DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS

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Enforcement\* – Technical Assistance – Guidance

- Stable:
  - Implementing Regulations [CFR]
- Less stable:
  - Significant Guidance documents
  - OCR Policy Manuals
  - Dear Colleague Letters
  - **POLITICS**

# OBAMA TRUMP BIDEN

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**Rescinded: This document has been formally rescinded by the Department and remains available on the web for historical purposes only.**



# IMPLEMENTING REGULATIONS

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TITLE 34 EDUCATION

SUBTITLE B REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION

CHAPTER I OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION

**PART 106 NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION  
PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL  
ASSISTANCE**

- <https://www2.ed.gov/policy/rights/reg/ocr/edlite-34cfr106.html#S6>

# IMPLEMENTING REGULATIONS

## 34 CFR PART 106

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- Definitions
- **§ 106.4 Assurance required.**(a) *General.* Every application for Federal financial assistance shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient ... that the education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with §106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

# IMPLEMENTING REGULATIONS

## 34 CFR PART 106

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- **§ 106.8 Designation of responsible employee and adoption of grievance procedures.**

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.
- (b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.

# 34 CFR PART 106

## Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

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- **§ 106.31 Education programs or activities.**
- (b) *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:
  - (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
  - (2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
  - (3) Deny any person any such aid, benefit, or service;
  - (4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;
  - (5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;
  - (6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;
  - (7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.



# 34 CFR PART 106

## Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

- **§ 106.41 Athletics.**
- (c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:
  - (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
  - (2) The provision of equipment and supplies;
  - (3) Scheduling of games and practice time;
  - (4) Travel and per diem allowance;
  - (5) Opportunity to receive coaching and academic tutoring;
  - (6) Assignment and compensation of coaches and tutors;
  - (7) Provision of locker rooms, practice and competitive facilities;
  - (8) Provision of medical and training facilities and services;
  - (9) Provision of housing and dining facilities and services;
  - (10) Publicity.

# 34 CFR PART 106

## SUBPART E—DISCRIMINATION ON THE BASIS OF SEX IN EMPLOYMENT IN EDUCATION PROGRAMS OR ACTIVITIES PROHIBITED

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- § 106.51 Employment.
- (b) *Application.* The provisions of this subpart apply to:
  - (1) Recruitment, advertising, and the process of application for employment;
  - (2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;
  - (3) Rates of pay or any other form of compensation, and changes in compensation;
  - (4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;
  - (5) The terms of any collective bargaining agreement;
  - (6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;
  - (7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;
  - (8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;
  - (9) Employer-sponsored activities, including those that are social or recreational; and
  - (10) Any other term, condition, or privilege of employment.

## § 106.54 COMPENSATION.

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- A recipient shall not make or enforce any policy or practice which, on the basis of sex:
  - (a) Makes distinctions in rates of pay or other compensation;
  - (b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

## § 106.6 EFFECT OF OTHER REQUIREMENTS.

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- (a) *Effect of other Federal provisions.* The obligations imposed by this part are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, as amended; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 292d and 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); the Equal Pay Act (29 U.S.C. 206 and 206(d)); and any other Act of Congress or Federal regulation.

# SCOTUS

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- *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979) (implied private right of action)
- *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982) (regulations [CFR] are valid)
- *Franklin v. Gwinnett Cty Pub Schs*, 503 U.S. 60, 62–63 (1992) (money damages available)
- *Davis v. Monroe Cty Bd. of Educ.*, 526 U.S. 629, 633 (1999) (student on student harassment)
  - Deliberate indifference standard
- *Barnes v. Gorman*, 536 U.S. 181, 187-88 (2002) (no punitive damages)
- *Jackson v. Birmingham Bd of Edu*, 544 U.S. 167, 179 (2005) (retaliation = int'l sex discrim)

# IOWA LAW MIRRORS FEDERAL LAW

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- Iowa Code 216.18 Rules of construction.
  - *This chapter shall be construed broadly to effectuate its purposes.*
- Pippen v. State of Iowa
- Goodpaster v. Schwan's

# IOWA CIVIL RIGHTS ACT

## 216.9 UNFAIR OR DISCRIMINATORY PRACTICES — EDUCATION.

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1. It is an unfair or discriminatory practice for any educational institution to discriminate on the basis of race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability in any program or activity. Such discriminatory practices shall include but not be limited to the following practices:

- a. Exclusion of a person or persons from participation in, denial of the benefits of, or subjection to discrimination in any academic, extracurricular, research, occupational training, or other program or activity except athletic programs;
- b. Denial of comparable opportunity in intramural and interscholastic athletic programs;
- c. Discrimination among persons in employment and the conditions of employment;
- d. On the basis of sex, the application of any rule concerning the actual or potential parental, family or marital status of a person, or the exclusion of any person from any program or activity or employment because of pregnancy or related conditions dependent upon the physician's diagnosis and certification.

# COMMON CLAIMS

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- Sexual Assault/Sexual Harassment in Educational Settings
- Employment
- Athletic Opportunities



# SEXUAL MISCONDUCT

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- Dear Colleague Letter April 2011 (rescinded)
- 2001 OCR Policy Manual on Sexual Harassment (rescinded)
- Trump Era/Sec. DeVos
  - Focus on Respondent
  - Narrow scope of investigations
  - Narrowed definition of Sexual Harassment
  - Higher BOP (no more POE)

# DEAR COLLEAGUE APRIL 4, 2011 (RESCINDED)

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- Dear Colleague:
  - Education has long been recognized as the great equalizer in America. The U.S. Department of Education and its Office for Civil Rights (OCR) believe that providing all students with an educational environment free from discrimination is extremely important. The sexual harassment of students, including sexual violence, interferes with students' right to receive an education free from discrimination and, in the case of sexual violence, is a crime.
- University of Iowa participated in Notice & Comment

# SEXUAL MISCONDUCT

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- Early Resolution (Sexual Assault Cases)
- Niesen v. Iowa State University
  - Deliberate Indifference
  - Retaliation
- Lessons:
  - Bias against Women Who Report – Social Isolation
  - Institutional Disconnect – Institutional Betrayal
  - Credibility Issues Created During Police Investigation; University Administrative Hearing

# SEXUAL MISCONDUCT

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- Bryant v. University of Iowa
  - Dear Men, Don't waive or shake your junk at student-employees
- Lange v. University of Iowa
  - Perp Admitted to Sexual Assault Twice – Still Not Enough
  - Deliberate indifference
- Lessons:
  - Brock Turner is not an Anomaly
  - New Approach: Gender Bias Not Deliberate Indifference

# EMPLOYMENT

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- Robinette Kelley v. Iowa State University, 311 F. Supp. 3d 1051 (S.D. Iowa 2018)
  - Retaliation against EOD & Title IX Coordinator
  - Dear Title IX Coordinator
- Lana Richmond v. SEMO
  - Coach
  - Student Athlete Complaints
- Kristi Ewasko v. SEMO
- Janelle Atkinson-Wingall v. SUNY
- Kathleen Wiler v. Kent State University

# DIARY OF A WIMPY KID, TITLE IX REFERENCE

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- <https://www.youtube.com/watch?v=wV0L86VZScs>

# SIGNIFICANT GUIDANCE DOCUMENT

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- A Policy Interpretation: Title IX and Intercollegiate Athletics
  - <https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>

# THREE-PART TEST


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- **Under Title IX**, there are three independent ways for schools to demonstrate that they are providing their male and female students with equal opportunities to play sports. **A school must show any one of the following:**
- **(1)** the percentages of male and female athletes are about the same as the percentages of male and female students enrolled, or
- **(2)** the school has a history and continuing practice of expanding athletic opportunities for the underrepresented sex (almost always female students), or
- **(3)** the school is fully and effectively meeting its female students' interests and abilities to participate in sports.
- [https://nwlc.org/wp-content/uploads/2015/08/nwlcathletics\\_titleixfactsheet.pdf](https://nwlc.org/wp-content/uploads/2015/08/nwlcathletics_titleixfactsheet.pdf)



# ATHLETICS OPPORTUNITIES

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- Women's sports participation increased following passage of Title IX
  - Still less \$\$\$ for recruiting, scholarships, resources
- ~ Opportunities must be substantially proportional to enrollment numbers by gender ~
- Public Information
  - Equity in Athletics Data Analysis ("EADA Data")
    - <https://ope.ed.gov/athletics/#/>
  - Assurances
- Football  Padding

# ATHLETICS OPPORTUNITIES

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- *Mayerova, et al. v. Eastern Michigan University*
  - Women's SB/Tennis Cut
  - Preliminary Injunction (TRO/Reinstatement)
    - Expert Costs
  - 6<sup>th</sup> Circuit Appeal
  - Consent Decree (<https://www.emich.edu/documents/consent-decree-executed-by-emu-4-3-2020.pdf?v=2020-04-13T21:01:03Z>)
    - Equitable Relief: Millions to Women's Sports
    - Compensatory Damages
    - Attorneys Fees

# EARLY RESOLUTION // LITIGATION

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- Plead, plead, plead
- Perfect plaintiff
- Private v. public university
- K-12
- Graduating seniors (Standing)
  - Move for class cert
- Expenses (expert costs, travel, etc.)

# SEX DISCRIMINATION

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- *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)
- *Lewis v. Heartland Inns of America, L.L.C.*, No. 08-3860 (8th Cir. Jan. 21, 2010)
- *Lampley v. Mo. Comm'n On Human Rights*, 570 S.W.3d 16 (Mo. 2019)

# RESOURCES

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- US Dept. of Education Office for Civil Rights
- TNG, LLC
- ATIXA
- Know Your IX ([knowyourix.org](https://knowyourix.org))
- <https://championwomen.org>